95-813

No. _____

In The

Supreme Court of the United States

October Term, 1995

BRAD BENNETT, et al.

Petitioners,

vs.

MARVIN PLENERT, et al.

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the citizen suit provision of the Endangered Species Act of 1973 (16 U.S.C. 1540(g)(1)) "any person" may commence a civil suit on his own behalf to enjoin the United States from violating the provisions of the Act or regulations issued thereunder. The questions presented are:

> Whether the broad standing mandated by Congress in the citizen suit provision of the Endangered Species Act is subject to a zone of interest test as a further, judicially imposed prudential limitation on standing;
>
> If standing to sue under the Endangered Species Act is subject to prudential limitations, whether those limitations permit only environmental plaintiffs to challenge government conduct alleged to violate the terms of the Act or whether the claims of economic injury raised by public water suppliers and water users are also within the zone of interests protected or regulated by the Act.

PARTIES

The petitioners are the Langell Valley Irrigation District and the Horsefly Irrigation District, each of which is organized as a political subdivision of the State of Oregon, and Brad Bennett and Mario Giordano, individuals resident in the State of Oregon.

The respondents are Marvin Plenert, the Regional Director, Region One of the United States Fish and Wildlife Service; John F. Turner, Director of the United States Fish and Wildlife Service; and Bruce Babbitt, Secretary of the United States Department of the Interior.

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JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on August 24, 1995. While a Suggestion for Rehearing In Banc was filed on October 23, 1995,[1] no petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

APPLICABLE FEDERAL LAWS

Section 11(g)(1) of the Endangered Species Act states:

> "Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf –
>
> > "(A) to enjoin any person, including the United States and any other governmental

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[1] Petitioners initially attempted to file a Suggestion for Rehearing In Banc on October 6, 1995. Because of the need for extended argument regarding the exceptional importance of the issues raised and the apparent inconsistency of the decision herein with a series of prior Ninth Circuit decisions, petitioners requested the Court of Appeals' permission to extend the page limitation ordinarily applicable to a Suggestion for Rehearing In Banc. That request was denied. (App. 45) However, the Court did extend the time for filing a revised Suggestion for Rehearing and a shortened Suggestion was thereafter filed. To date, no ruling has issued from the Ninth Circuit regarding the Suggestion for Rehearing In Banc.

instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." (81 Stat. 884, 16 U.S.C. § 1540(g)(1))

STATEMENT OF THE CASE

This case is appropriate for the granting of certiorari for two reasons. First, the Ninth Circuit Court of Appeals has rendered a decision regarding the applicability of prudential standing requirements to actions brought under the Endangered Species Act (16 U.S.C. §§ 1531 et seq.) which is in conflict with the decision of another United States court of appeals on the same matter. Specifically, the decision in this case conflicts with a decision of the Eighth Circuit. Second, this case raises an important issue of law concerning the scope of the interests protected or regulated by the Endangered Species Act ("ESA") which has not been, but should be, settled by this Court.

In its decision below, the Ninth Circuit Court of Appeals, per Judges Reinhardt, Pregerson and Canby, held that Congress' inclusion of a citizen suit provision in the ESA empowering "any person" to seek to enjoin a violation of the Act does not eliminate the need of also establishing prudential standing to bring such a suit. (App. 11) Because, in the Ninth Circuit's view, the overall purposes of the ESA are "singularly devoted to the goal of species protection," the economic and recreational interests asserted by two small irrigation districts and their water users lie outside the "zone of interest" protected by the Act. (Id. 12-13) In the Ninth Circuit, "only

plaintiffs who allege an interest in the preservation of endangered species" will have standing, in the future, to challenge government conduct alleged to violate the provisions of the ESA. (Id. 11)

As the Ninth Circuit recognized (App. 8, n.3), its ruling is contrary to the decision reached by the Eighth Circuit in *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1990), *opinion after remand*, 911 F.2d 117 (8th Cir. 1990), *rev'd on other grounds sub. nom., Lujan v. Defenders of Wildlife*, ___ U.S. ___, 119 L.Ed.2d 351 (1992). There, the court held that Congress' enactment of the citizen suit provision found in the ESA abrogated the necessity of establishing prudential standing. (851 F.2d at 1039) Thus, according to the Eighth Circuit, a plaintiff commencing suit under the ESA need only meet the requirements for standing established by Article III of the Constitution. (Id.) When this Court granted certiorari in *Defenders of Wildlife*, it ultimately reversed the finding of the Eighth Circuit that the plaintiffs therein *met* the standing requirements imposed by Article III. (*Lujan v. Defenders of Wildlife, supra*, ___ U.S. ___, 119 L.Ed.2d 351, 365) At the same time, however, the Court did *not* alter the conclusions of the Eighth Circuit regarding prudential standing.

The issues presented by this petition arise in the context of litigation commenced in March, 1993 by two small irrigation districts, organized as political subdivisions of the State of Oregon, and two individual ranchers resident in Oregon, who receive their primary supply of irrigation water under Federal contract from reservoirs operated by the Bureau of Reclamation ("Bureau") in the eastern portion of the Klamath project, in Southern Oregon and Northern California. (App. 33-34)

Throughout most of the twentieth century, the Bureau utilized long-standing procedures for storing and releasing water from its Klamath project reservoirs which produced a reliable supply of water for irrigation purposes. In 1992, however, pursuant to a biological opinion developed by respondents with respect to two species of fish (the Lost River sucker and the shortnose sucker) listed as endangered under the ESA, it was determined that the Bureau's operational procedures for the reservoirs would be likely to jeopardize the continued existence of the two species. (Id. 37)

Accordingly, in purported compliance with the provisions of Section 7 of the ESA (16 U.S.C. § 1536), respondents developed a so-called "reasonable and prudent alternative" to the Bureau's proposal to maintain its long-standing operational procedures. The alternative requires reservoir levels to be maintained substantially higher during certain periods (App. 39), with the result that petitioners receive a correspondingly reduced supply of irrigation water, to their detriment. (Id. 40)

After complying with the necessary procedural prerequisites,[2] petitioners commenced litigation against respondents in the United States District Court for the District of Oregon under the citizen suit provision of the ESA (16 U.S.C. § 1540(g)(1)) and the provisions of the Administrative Procedure Act (5 U.S.C. §§ 701 et seq.) (App. 31-44) *Inter alia*, petitioners' Complaint alleged a

[2] By letter dated November 12, 1992, petitioners provided respondents with a 60-day Notice of Intent to Sue (16 U.S.C. § 1540(g)(2)(A)) (App. 33)

violation of Section 7 of the ESA (16 U.S.C. § 1536)[3] resulting from respondents' imposition of restrictions on the withdrawal of irrigation water from the reservoirs on which petitioners rely. (App. 41) In addition, petitioners alleged that respondents' biological opinion effectively designated critical habitat for the two listed species without considering the economic effect of doing so, in violation of Section 4 of the ESA (16 U.S.C. § 1533(b)(2)).[4]

[3] Section 7(b)(3)(A) of the Endangered Species Act provides:

> "Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action." (92 Stat. 3752, 16 U.S.C. § 1536(b)(3)(A))

[4] Section 4(b)(2) of the Endangered Species Act provides:

> "The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will

(App. 42) Based upon their claims, petitioners requested the trial court to compel respondents to withdraw their biological opinion and to declare respondents' actions to be in violation of both Sections 4 and 7 of the ESA. (App. 43-44)

Respondents moved to dismiss the complaint on the ground that petitioners lacked standing. (App. 20) In an unpublished order issued November 18, 1993, the District Court agreed that petitioners lacked prudential standing to sue under the ESA.[5] (App. 25-29)

On appeal, the Ninth Circuit rejected the contention that the citizen suit language of Section 11(g) of the ESA abrogates the need to demonstrate prudential standing. (App. 11) Finding that such a contention, if accepted, would permit plaintiffs to sue even though their purposes were "plainly inconsistent with, or only 'marginally related' to, those of the Act . . . " the Ninth Circuit held:

> "Only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interest protected by the ESA.

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result in extinction of the species concerned." (92 Stat. 3764, 16 U.S.C. § 1533(b)(2))

[5] The only authority cited by the District Court for its view was the trial court decision in *Pacific Northwest Generating Cooperative v. Brown*, Civ. Nos. 57-973, 92-1260 and 92-1264 (D.Or. April 1, 1993). (App. 27-28) Subsequent to issuance of the district court's opinion in the case at bench, the Ninth Circuit issued its decision on appeal in *Pacific Northwest Generating Cooperation v. Brown*, 38 F.3d 1058 (9th Cir. 1994). On the crucial issue of prudential standing, the Ninth Circuit – in 1994 at least – concluded that economic injury *could* be sufficient to satisfy the requirements of prudential standing, assuming those requirements even apply to actions commenced under the ESA. (38 F.3d 1058, 1065-66)

> Because the plaintiffs have not alleged such an interest in their complaint, they do not have standing." (App. 11)

Finding the purposes of the ESA to be singularly aimed at species preservation, the Ninth Circuit also concluded that potential plaintiffs with economic or recreational claims could not satisfy the requisites of prudential standing:

> "The overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation; they do not embrace the economic and recreational interests that underlie the plaintiffs' challenge. (App. 12-13)

Indeed, the fact that petitioners sought to raise a competing interest in water from the affected reservoirs was enough, in the Ninth Circuit's view, to deprive them of standing to challenge the Government's determination of the amount of water necessary for the two protected species:

> "In short, the plaintiffs do not seek to further the statutory purpose. Nor do they allege any community of interest of any kind between themselves and the suckers. To the contrary, they claim a competing interest – an interest in using the very water that the government believes is necessary for the preservation of the species." (App. 16)

The fact that Congress had specifically directed the Government to consider economic factors in making the kinds of determinations challenged by the petitioners did not cause the Ninth Circuit to alter its views on standing:

> "Finally, we are aware that the ESA specifically provides that the government should consider a variety of factors – including economic ones – in designating critical habitat for a species. (*See*, 16

> U.S.C. § 1533(b)(3)). The Act's inclusion of such directives does not alter our analysis. We do not believe that in setting forth the factors to be weighed in formulating a plan for protecting species, Congress intended to do more than ensure a rational decision-making process by providing guidance for government officials. Certainly, it did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him. . . . To interpret the statute in the manner suggested by plaintiffs would be to transform provisions designed to further species protection into the means to frustrate that very goal. . . . Accordingly, we hold that the plaintiffs have no standing under the ESA." (App. 17, citations omitted.)

Thus, on August 24, 1995, the Ninth Circuit affirmed the Judgment of the District Court.

ARGUMENT

The Ninth Circuit Court of Appeals erred in holding that a zone of interest test applies to claims brought under the Endangered Species Act. Even if the petitioners would otherwise be barred by the rules of prudential standing, the decisions of this Court hold that Congress may expand standing to the full extent permitted by Article III of the Constitution. By authorizing "any person" to commence a civil action to enjoin the United States from violating the ESA, Congress did precisely that.

Moreover, the Ninth Circuit erred in applying the rules of prudential standing to bar all potential plaintiffs under the ESA save those "who allege an interest in the

preservation of endangered species." Not only does the circuit court's highly exclusionary decision ignore the limitations on prudential standing imposed by the decisions of this Court; it effectively disregards the efforts of Congress to expand the zone of interests cognizable under the ESA to encompass the precise claims raised by the petitioners in this case. By its decision, the Ninth Circuit has effectively closed the courts to the only potential plaintiffs who have a significant interest in assuring that the Government conducts the kind of balanced proceedings under the ESA which Congress intended.

1. This Court Should Grant Review To Resolve A Conflict Among The Circuits On the Same Matter And To Give Effect To Congress' Intent To Expand Standing To Sue Under the ESA

The zone of interest test was first articulated in the companion decisions in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970) and *Barlow v. Collins* 397 U.S. 159 (1970), both of which involved the reach of Section 10 of the Administrative Procedure Act (5 U.S.C. § 702). Writing for the Court in both cases, Justice Douglas cast the zone of interest test as a rule of judicial self-restraint (397 U.S. at 154), not as a rule having constitutional dimension. Moreover, he recognized that Congress could, if it so elected, expand the limits of standing to the boundaries imposed only by Article III of the Constitution:

> "The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complaint is arguably within the zone of interest to be protected or regulated

by the statute or constitutional guarantee in question.

. . .

"Apart from Article III jurisdictional questions, problems of standing, as resolved by this Court have involved a 'rule of self-restraint.' Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise." (397 U.S. at 153-54, citations omitted)

Commenting upon *Data Processing* and *Barlow*, one leading treatise observes:

"The zone of interest requirement was apparently treated in the Data Processing opinion as a matter of judicial self-restraint. Against the values of restraint, the Court set the perception that Congress had intended § 10 of the Administrative Procedure Act to enlarge the class of people who can challenge administrative action. As the opinion left matters, it could have been possible to find that the zone of interest requirement is an important part of the standing doctrine, to be weighed heavily, *unless Congress has acted to encourage review*. It would also have been possible to conclude that little need be shown to satisfy the requirement." (Wright, Miller and Cooper, *Federal Practice and Procedure*; Jurisdiction 2d § 3531.7 emphasis added)

Nearly a decade later, the Court elaborated upon its earlier statement that Congress could, by legislation, resolve the prudential standing issue. In *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) – which is cited by the Ninth Circuit, but never applied to the circumstances presented in the present case (App. 17-18) – the Court considered language in the Fair Housing Act of 1968 (42 U.S.C. §§ 3601 *et seq.*) which authorized any

"person aggrieved" to commence a civil action to enforce the rights granted by the Act. Concluding that Congress had intended to grant standing "as broad as is permitted by Article III of the Constitution" (441 U.S. at 109) the Court stated:

"Congress may, by legislation, expand standing to the full extent permitted by Article III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.' In no event, however, may Congress abrogate the Article III minima: A plaintiff must always have suffered 'a distinct and palpable injury to himself,' that is likely to be redressed if the requested relief is granted." (441 U.S. at 100, citations omitted)

Subsequently, in *Defenders of Wildlife v. Hodel, supra*, 851 F.2d 1035, *opinion after remand*, 911 F.2d 117, *rev'd on other grounds sub. nom. Lujan v. Defenders of Wildlife, supra*, ___ U.S. ___, 119 L.Ed.2d 351, the Eighth Circuit concluded that Congress had undertaken precisely such an abrogation of prudential standing with respect to litigation commenced under the provisions of the ESA:

"Unlike the constitutional limitations [on standing], Congress may eliminate the prudential limitations by legislation. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 at 100, 99 S.Ct. at 1608. Where 'Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.' *Sierra Club v. Morton*, 405 U.S. 727, 732, 92 S.Ct. 1361, 1364-65, 31 L.Ed.2d 636 (1972). In this case, the ESA provides that 'any person'

> may commence a suit to enjoin any person who is alleged to be in violation of the ESA. *See* 16 U.S.C. § 1540(g). Environmental associations are 'persons' and may bring suit in their own name. *Id.* at 1532(13). Defenders therefore need meet only the constitutional requirements for standing for their claims under the ESA." (851 F.2d at 1039)

In the course of reviewing the Eighth Circuit's decision in *Defenders of Wildlife, supra,* this Court considered the question of standing to sue under the ESA at length. (*Lujan v. Defenders of Wildlife, supra,* ___ U.S. ___, 119 L.Ed.2d 351 (1992)). While the Court reversed the Eighth Circuit's conclusion that the plaintiffs had met the standing requirements imposed by Article III of the Constitution, it left intact the circuit court's conclusion regarding congressional abrogation of prudential standing through the enactment of Section 11(g) of the ESA. Indeed, when the Court discussed prudential standing at all, it was in terms which emphasized judicial self-government rather than the concept of a barrier to otherwise qualified potential plaintiffs:

> "One of those landmarks, setting apart the 'cases' and 'controversies that are of the justiciable sort referred to in Article III – 'serving to identify those disputes which are appropriately resolved through the judicial process' – is the doctrine of standing. *Though some of its elements express merely prudential considerations that are part of judicial self-government,* the core component of standing is an essential and unchanging part of the case – or controversy requirement of Article III." (___ U.S. ___, 119 L.Ed.2d at 364, citations omitted)

The Ninth Circuit's decision effectively ignores the consistently expressed view of this Court, that Congress

may expand standing under a statute to the limits of Article III of the Constitution. Although it cites *Gladstone Realtors* to that effect (App. 8) it never applies *Gladstone* – or *Data Processing* or any other decision of this Court – to the citizen suit language actually adopted by Congress in the ESA. Likewise, although the Ninth Circuit acknowledges a conflict between its decision and the Eighth Circuit's decision in *Defenders of Wildlife, supra,* (App. 8, n.3) it never offers to explain why, in its view, the Eighth Circuit's decision is incorrect.[6]

The foregoing omissions are crucial in view of the citizen suit language enacted by Congress as part of the ESA. By authorizing "any person" to sue to enjoin a violation of the ESA, Congress chose language even

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[6] The Ninth Circuit's decision also points out that the split of authority among the circuit courts of appeal includes the Circuit Court of Appeals for the District of Columbia (App. 8) which has ruled, in three cases, that Congress' decision to incorporate citizen suit language into the ESA did not abrogate the obligation of a plaintiff to demonstrate prudential standing. (See *State of Idaho By and Thru Idaho Public Utilities Commission v. ICC,* 35 F.3d 585, 592 (D.C. Cir. 1994); *Humane Soc. of the U.S. v. Hodel,* 840 F.2d 45 (D.C. Cir. 1988); *National Audubon Society v. Hester,* 801 F.2d 405, 407 (D.C. Cir. 1986)

It is noteworthy, however, that none of the D.C. Circuit's opinions on the issue – unlike the Eighth Circuit's opinion in *Defenders of Wildlife, supra* – was the subject of a hearing by this Court. Nor has the D.C. Circuit attempted to use prudential standing to bar everyone except environmental plaintiffs from the ability to sue under the ESA. To the contrary it has found, for example, that a state's proprietary interest in land satisfies the test without regard to whether the state has an interest in the preservation of endangered species. (*State of Idaho, supra*) Indeed, the D.C. Circuit appears to have never applied prudential standing to exclude *any* class of plaintiffs from an ESA suit, let alone all classes of potential plaintiffs, save one.

broader than that used in *Gladstone Realtors*. Indeed, it used the broadest language possible.[7]

In these circumstances, the Ninth Circuit's assertion that its decision is justified because *it* has applied prudential standing obligations in the face of other citizen suit provisions (App. 7, 9) is largely irrelevant. Moreover, the assertion is a considerable overstatement. For example, in *Pacific Northwest Generating Cooperative v. Brown*, *supra*, 38 F.3d 1058 – cited by the Ninth Circuit as support for its application of prudential standing in the present case (App. 7) – the Court, in fact, *declined* to resolve the issue of whether the ESA's citizen suit provision abrogates the requirements of prudential standing. Instead, it *assumed* the applicability of those requirements and concluded that the *economic* interest of power users reliant upon the federal Bonneville project was enough to satisfy the test:

> "It is an open question whether the plaintiffs must satisfy the prudential 'zone of interest' test in addition to Article III standing requirements. A sister circuit has dispensed with this requirement. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1988), *opinion after remand*, 911 F.2d 117 (8th Cir. 1990), *rev'd on other grounds sub. nom. Lujan v. Defenders of Wildlife*, 122 S.Ct. 2130, 119 L.Ed.2d 351 (1992). We, however, will assume that the requirement must be met. For

[7] "Person" is defined in Section 3 of the ESA (16 U.S.C. § 1532(13)) as follows:

> "The term 'person' means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department or instrumentality of the Federal government, of any State or political subdivision thereof, or any foreign government."

> reasons now to be stated, we conclude that it has been met.
>
> . . .
>
> The present endangered or threatened status of the species imposes actual costs upon the plaintiffs. They have a real economic interest in changing the status. We see no reason why that economic interest is not convertible into a legal interest. Once that legal interest is recognized, the plaintiffs qualify for standing under footnote seven." (38 F.3d 1058 at 1065-66)

Similarly, in *Alvarez v. Longboy*, 697 F.2d 1333 (9th Cir. 1983) also cited by the Ninth Circuit as support for its decision in the present case (App. 10), the Court construed a provision in the Farm Labor Contractor Registration Act that permitted "any person aggrieved" to bring suit. (697 F.2d at 1336) Analyzing the requirements imposed by the zone of interest test in this context, the Ninth Circuit stated:

> "This language is patterned after language defining standing under the Federal Civil Rights statutes, and . . . show[s] a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." (697 F.2d at 1336)

In sum, as the Ninth Circuit recognized in *Alvarez*, and as this Court has recognized in *Data Processing* and *Gladstone*, the constitutionally imposed standing requirements of Article III will continue to apply to *all* potential plaintiffs under the ESA. Those requirements are enough to ensure that, in the future, real plaintiffs will bring real cases and controversies to the courts. At the same time, given Congress' manifest intention, expressed through Section 11(g) of the ESA, to expand standing under the Act to the limits of Article III, there is simply no basis to

exclude all potential plaintiffs, save one apparently favored group, through the inappropriate application of a zone of interest test.

2. The Ninth Circuit's Decision Misapplies The Concept of Prudential Standing To Exclude Potential Plaintiffs Who Are Within the Zone of Interest Regulated By The ESA

The result of the Ninth Circuit's decision in the present case is to exclude from federal court all potential plaintiffs under the ESA unless they allege an interest in the preservation of endangered species. (App. 11) If a potential plaintiff is unlucky enough to be dependent upon a federal project which makes use of a resource determined by federal wildlife officials to be necessary for an endangered species, the Ninth Circuit's decision bars the plaintiff from challenging any determination regarding disposition of the resource, even if the disposition is incompatible with the requirements of the law. It reaches this result because the potential plaintiff, in the Ninth Circuit's view, is claiming a "competing interest" in the resource and is thus outside the zone of interest protected by the ESA. (App. 16) Indeed, even if the potential plaintiff asserts an economic interest expressly recognized in the Act, he remains outside of the zone of interest, according to the Ninth Circuit, since his assertion of economic claims "would be to transform provisions designed to further species protection into the means to frustrate that very goal." (App. 17) Petitioners respectfully suggest that this remarkable application of prudential standing lies well beyond the bounds of this Court's standing decisions.

When this Court initially articulated the concept of prudential standing, it did so in terms which recognized not only a zone of interest "protected" by the statute in question, but also a zone of interest "regulated" by the relevant statute:

> "The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complaint is arguably within the zone of interest to be protected *or regulated* by the statute or constitutional guarantee in question." (*Association of Data Processing Service Organization v. Camp, supra*, 397 U.S. 150 at 153, emphasis added)

By focusing exclusively on the purported zone of interest "protected" by the ESA and ignoring the zone of interest *regulated* under the ESA, the Ninth Circuit has managed to truncate the prudential standing test in a manner incompatible with the very decision which established the test. Because they receive their primary source of irrigation water from the federal reservoirs effectively regulated by the biological opinion adopted by respondents, the petitioners are without doubt, "arguably within the zone of interest . . . regulated by the statute . . . in question."

Almost two decades after first articulating a prudential standing test, this Court elaborated upon the limitations inherent in any effort to apply the test. In *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), the Court considered a challenge brought by an association of securities dealers utilizing Section 10 of the Administrative Procedure Act (the same statute utilized in *Data Processing* and *Barlow*) to challenge a ruling by the Comptroller of the Currency that permitted national banks to

conduct discount brokerage operations from locations where branch banking would be prohibited. According to the Ninth Circuit, prior to *Clarke*, the zone of interest test " . . . appeared to be on the verge of being abandoned." (App. 5)

While the Ninth Circuit believes *Clarke* "resuscitated" prudential standing and cites the decision for the proposition that a zone of interest test applies even in cases which are not brought under the Administrative Procedure Act (App. 5-6), it never actually manages to refer to the main text of the Court's opinion in the case. Thus, the Ninth Circuit's decision ignores the following discussion appearing in the majority opinion in *Clarke*:

> "The 'zone of interest' test *is a guide* for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress intended to permit the suit. *The test is not meant to be especially demanding.*" (479 U.S. at 399, emphasis added)

Thus, according to this Court, there need only be a "plausible relationship" between the interests of the litigants and the policies embedded in the overall context of the statute at issue. (479 U.S. at 403) Moreover, as this Court explained:

> "The principal cases in which the 'zone of interest' test has been applied are those involving claims under the APA, and the test is most usefully understood as a gloss on the meaning of § 702." (479 U.S. at 400, n.16)

This analysis by the *Clarke* majority led one respected commentator to a view fundamentally different than that expressed by the Ninth Circuit regarding the "resuscitation" of the zone of interest test and its applicability beyond actions brought pursuant to the APA:

> "This opinion [*Clarke*] puts the zone of interest test once again in eclipse. The most obvious reading would be to limit the test to administrative review proceedings under § 10 of the APA, and to apply it to permit standing unless there are special reasons to fear that a particular plaintiff will impair the objectives embedded in the underlying regulatory statute. The presumption of reviewability is likely to be difficult to overcome. Beyond this point, only the brave would venture to illuminate the obscure hint that other settings will support different prudential tests that somehow resemble the zone of interest test." (Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d § 3531.7 (1995 Supplement))

In short, the decision of the Ninth Circuit in the present case turns the zone of interest test on its head. Rather than a test not meant to be "especially demanding," it is now a test which can be wielded, in the Ninth Circuit, to exclude potential plaintiffs virtually at will. From a test understood to be a "gloss" on the meaning of Section 702 of the APA, the test will now be employed, within the Ninth Circuit, to close the courts to plaintiffs whether they bring suit under the APA or not. From a test thought to be "in eclipse," the zone of interest test now emerges, within the Ninth Circuit, as a highly discriminatory tool to be used to bar entire groups of potential

plaintiffs from court even if they are within the zone of interest "regulated" by the statute in question. This result, petitioners respectfully submit, is beyond the bounds of any reasonable interpretation of the prior decisions of this Court.

3. The Ninth Circuit's Application of Prudential Standing Ignores Amendments to the ESA That Were Enacted to Expand the Range of Interests Protected by the Act

If a prudential standing test nonetheless applies to actions brought under the ESA, it is evident that the Ninth Circuit has construed the applicable zone of interest too narrowly. As the basis for its conclusion that petitioners fail to satisfy the requirements of prudential standing, the Ninth Circuit stated:

> "The overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation; they do not embrace the economic and recreational interests that underlie the plaintiffs' challenge." (App. 12-13)

This view of the ESA is at odds with at least three different amendments adopted by Congress for the purpose of expanding the range of interests cognizable under the Act. Each of these amendments is directly related to the claims raised by the petitioners in this proceeding.

(a) Congress Amended the ESA to Require Consideration of Economic Feasibility and Community Impacts in the Development of Biological Opinions

In 1978, Congress amended the ESA by enacting the consultation procedures which resulted in the biological opinion at issue in this case. Its purpose in doing so was

to introduce flexibility into the Act. (See e.g., H.R. Rep. No 1625, 95th Cong., 2nd Sess., at 3 (1978); 124 Cong. Rec. 9804 (1978) (Statement of Sen. Baker); 124 Cong. Rec. 21,135 (1978) (Statement of Sen. Randolph); 124 Cong. Rec. 21,139 (1978) (Statement of Sen. Scott)). Congress achieved its purpose by charting a path which incorporates a balancing of economic impacts into the consultation procedure. (124 Cong. Rec. 38,132 (1978) (Statement of Rep. Murphy); 124 Cong. Rec. 38,138 (1978) (Statement of Rep. Burgener); 124 Cong. Rec. 9,804 (1978) (Statement of Sen. Baker); 124 Cong. Rec. 9,805 (1978) (Statement of Sen. Wallop)).

The specific vehicle which Congress chose for this purpose was a comprehensive amendment of Section 7 of the ESA. (16 U.S.C. § 1636) It is under this section, as amended, that petitioners brought one of their two ESA-based claims in this case. (App. 41) Included as part of the amendment of Section 7 was a requirement that "reasonable and prudent alternatives" be developed by the Secretary in the event a project, as proposed, is found to cause jeopardy to a listed species. (16 U.S.C. § 1536(b)(3)(A).)[8] The language chosen – "reasonable and

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[8] Section 7(b)(3)(A) of the Act (16 U.S.C. § 1536(b)(3)(A)) provides:

> "Promptly after conclusion of consultation under paragraphs (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal Agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. *If jeopardy or adverse modification of critical habitat is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not*

prudent alternatives" – is word-for-word identical to language chosen by the *same* Congress, at the *same* time and used in the *same* section of the amended Act, to describe a key finding required of a so-called "Endangered Species Committee" in order for it to grant an exemption from the jeopardy requirements of the Act. (16 U.S.C. § 1536(h)(1)(A)(i))

It is well recognized, of course, that terms should be construed consistently throughout the same statute. (*Ratzlaf v. United States*, 510 U.S.___, 126 L.Ed.2d 615, 623 (1994); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S.___, 120 L.Ed.2d 379 (1992)) Indeed, in other cases, the Ninth Circuit itself has recognized that when the *same* word or phrase is used in different parts of the same statute, the courts will presume that the word or phrase has the same meaning throughout. (*S&M Inv. v. Tahoe Regional Planning Agency*, 911 F.2d 324, 328 (9th Cir. 1990), *cert. den.*, 111 S.Ct. 963 (1991); *Boise Cascade Corp. v. U.S.E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991))

Reference to the legislative history of the 1978 amendments of the ESA discloses that the phrase "reasonable and prudent alternatives" was defined in detail during debate on S. 2899, 95th Cong., 2nd Sess. (1978), which contained the amendatory language ultimately adopted by Congress. During a colloquy concerning the meaning of the phrase "reasonable and prudent alternatives," Senator Howard Baker – without dissent – stated the following:

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violate subsection (a)(2) of this section and can be taken by the Federal Agency or applicant in implementing the agency action." (Emphasis added)

> "It is the intent of the Environment and Public Works Committee that the cabinet-level panel established by S. 2899 [the Endangered Species Committee] in evaluating alternatives examine not only engineering 'feasibility,' but also environmental and *community impacts, economic feasibility and other relevant factors*. In other words, the Environment and Public Works Committee believes that the use of the term 'reasonable' rather than 'feasible' gives more flexibility to the Endangered Species Committee in its review of 'irresolvable' conflicts arising under the Endangered Species Act." (124 Cong. Rec. 21,590 (1978)).

Senator Baker's position as one of the chief sponsors of the so-called "Culver-Baker Amendments" which comprised S. 2899, is important. As expressed in *Overseas Educ. Ass'n, Inc. v. FLRA*, 876 F.2d 960 (D.C. Cir. 1989):

> " . . . [N]o one can gainsay the overwhelming judicial support for the proposition that explanations by sponsors of legislation during floor discussion are entitled to great weight when they cast light on the construction properly to be placed upon statutory language. This principle is firmly embedded in the jurisprudence of the Supreme Court, e.g., *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-527 (1982) ('remarks of the sponsor of language ultimately enacted are an authoritative guide to the statute's construction'); *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) (Sponsor's statements entitled to weight)" (876 F.2d at 967, n.41)

Of at least equal significance is the fact that respondents, themselves, have interpreted the ESA to require that the "reasonable and prudent alternatives" which lie at the heart of any biological opinion which makes a jeopardy finding, must be "economically feasible." In

Joint Regulations adopted by the United States Fish and Wildlife Service and the Marine Fisheries Service for the purpose of administering the ESA, the agencies define "reasonable and prudent alternatives" as follows:

> "*Reasonable and prudent alternatives* refer to alternative actions during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistently with the scope of the federal agency's legal authority and jurisdiction, *that are economically* and technologically *feasible*, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat." (50 CFR § 402.02, emphasis added)

In short, *both* Congress *and* the agencies charged with implementation of the ESA recognized that development of the kind of "reasonable and prudent alternative" which lies at the heart of the present case must be guided by the concept of "economic feasibility." The Ninth Circuit's decision in this case, however, denies standing to the only group of potential plaintiffs with a substantial interest in ensuring compliance with the "economic feasibility" requirement.

(b) Congress Explicitly Required a Balancing of Impacts as Part of the Designation of Critical Habitat

When Congress amended the ESA in 1978, it also modified Section 4 (16 U.S.C. § 1533) to add a new paragraph which obligates the Secretary to weigh and balance the benefits and burdens of including particular areas

within designated critical habitat.[9] According to the House Report which accompanied the bill (H.R. 14104, 95th Cong., 2nd Sess. (1978)) that added the balancing language, the proposal represented a compromise between disparate points of view: it attempted to retain the basic integrity of the ESA while introducing some flexibility which would permit exemptions from the Act's requirements. (H.R. Rep. No. 1625, 95th Cong., 2nd Sess., (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9463-64)).

During the debates in the House leading to adoption of the bill, Representative Leggett, the bill's author, described the purpose of the balancing requirement. He stated:

> "The Endangered Species Act has been criticized because it allows for no consideration of the economic impact of listing a species or designating critical habitat. Although H.R. 14104 retains the Act's stringent mandate, it does introduce a consideration of economic impact in several respects. . . . [T]he bill includes a provision which requires the Secretary to evaluate the

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[9] The language adopted by Congress in 1978 added the following paragraph to Section 4(b) of the ESA:
"In determining the critical habitat of any endangered or threatened species, the Secretary shall consider the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat, and he may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species. (Act of Nov. 10, 1978, Pub. L. No. 95-632, 1978 U.S.C.C.A.N. (92 Stat.) 366).

> economic impact of designating critical habitat for invertebrate species. This provision authorizes the Secretary to alter the designation of critical habitat for the species if he determines that the benefits associated with excluding the habitat outweigh the benefits associated with the designation. . . . " (124 Cong. Rec. 38,134 (1978) (Statement of Rep. Leggett)).

In 1982 when Congress later reauthorized and amended the ESA (P.L. 97-304) the House Report which accompanied the amendments stated the following regarding the balancing obligation in Section 4:

> "Desirous to restrict the Secretary's decision on species listing to biology alone, the [Merchant Marine and Fisheries] Committee nonetheless recognized that the critical habitat designation, with its attendant economic analysis, offers some counter-point to the listing of species without due consideration for the effects on land use and other development interests." (H.R. 567, 97th Cong., 2nd Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2812 (Merchant Marine and Fisheries Committee)).

Congress thus amended the ESA for the explicit purpose of broadening its focus to accommodate economic-based interests in connection with the designation of critical habitat. Precisely such interests were raised in the complaint filed by appellants herein. With considerable clarity they alleged a designation by the Secretary of critical habitat without *any* consideration of economic impacts, in violation of the ESA. (App. 42)

Despite petitioners' efforts to invoke the economic balancing requirement amended into the ESA by Congress, however, the Ninth Circuit was unmoved:

> "[W]e are aware that the ESA specifically provides that the government should consider a

> variety of factors – including economic ones – in designating critical habitat for a species. (*See*, 16 U.S.C. § 1533(b)(3)). The Act's inclusion of such directives does not alter our analysis. We do not believe that in setting forth the factors to be weighed in formulating a plan for protecting species, Congress intended to do more than ensure a rational decision-making process by providing guidance for government officials. Certainly, it did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him." (App. 17).

The Ninth Circuit's conclusions are inconsistent with the statements of both the author of the bill which added the economic balancing requirement to the ESA and the House Committee with jurisdiction over the Act. Of equal concern, the Ninth Circuit's decision denies standing to the only potential plaintiffs possessing a substantial interest in assuring that the habitat designation process in fact *is* rational in its consideration of economic factors. The absence of any consideration of economic impacts is at the heart of the petitioners' remaining claim for relief under the ESA. (App. 42)

In this regard, it is unrealistic to expect, as the Ninth Circuit apparently does that, in future, the cudgels of litigation will be picked up by a *regulated* federal agency and used against a federal *regulating* agency:

> "None of the plaintiffs is directly subject to the regulatory action. Rather, it is the Bureau of Reclamation which would be required to act if any rules regarding reservoir water levels are ultimately adopted. We do not consider here when a directly regulated entity, or a party standing in the shoes of such an entity, would have standing." (Slip Opinion, p. 10654, n.2)

While the specter of one agency of the Department of Interior suing a sister agency of the same Department may be interesting to contemplate in a theoretical sense, the dearth of such cases suggests that the likelihood of sister agency litigation in the real world is not high. Moreover, it is unclear how potentially collusive litigation brought by sister agencies answerable to the same cabinet official furthers the goal of the standing doctrine; *viz*, identifying those justiciable "cases" or "controversies" which are "appropriately resolved through the judicial process. . . . " (*Lujan v. Defenders of Wildlife, supra*, ___ U.S. ___; 119 L.Ed.2d at 364) As has been true for a considerable period of time, in the Ninth Circuit and elsewhere, those who rely on federal projects – not the federal operator of the project – are more likely to present a real "case" or "controversy" regarding federal regulatory action. This is so since the operator of the project effectively serves as a middleman, while the users of the water, who rely upon the project for inputs critical to their homes, farms or businesses are, in fact, the parties who possess the "interest" which is regulated.

(c) Congress Explicitly Required Federal Agencies to Cooperate With State and Local Agencies to Resolve Water Resources Issues in Concert With the Conservation of Endangered Species

Finally, the Ninth Circuit asserts that its analysis of the applicable zone of interest is borne out by Section 2 of the ESA (16 U.S.C. § 1531) which sets forth the Act's

purposes. (App. 13-14) Thus, in quoting Section 2(b),[10] the Court declares:

> "That section provides no basis for concluding that the plaintiffs' interest in obtaining water that the government deems critical to the survival of endangered fish is a protected one." (App. 13-14)

Unfortunately, the Ninth Circuit neglected to examine the very next subsection of the ESA which sets forth Congress' *policy* regarding the protection of endangered species and provides the following, in relevant part:

> "(2) It is further declared to be the policy of Congress that federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert[11] with conservation of endangered species."

With respect to the singular matter of "water resource issues", it is thus evident that Congress granted state and local water resource agencies an interest in obtaining federal cooperation in resolving endangered

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[10] Section 2(b) of the ESA provides:

> "The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, to provide a program for the conservation of such endangered and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section."

[11] In *Jeffers v. United States*, 432 U.S. 137, 148-49 (1977), this Court defined the words "in concert" in the following terms:

> "In the absence of any indication from the legislative history or elsewhere to the contrary, the . . . likely explanation is that Congress intended the word 'concert' to have its common meaning of agreement in a design or plan."

species conservation issues agreeably with water resource management concerns. Such agencies – and appellants Horsefly Irrigation District and Langell Valley Irrigation District are each alleged to be a subdivision of the State of Oregon – have a unique interest that is protectable under the terms of the ESA itself. That interest was completely ignored by the Ninth Circuit which found, instead, that the ESA has a "singular" goal of ensuring species preservation. Simply put, the finding is incompatible with the policy language of the ESA itself.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

DATED: November 21, 1995

Respectfully submitted,

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APPENDIX

Brad BENNETT; Mario Giordano; Langell Valley Irrigation District, a political subdivision of the state of Oregon; Horsefly Irrigation District, a political subdivision of the State of Oregon, Plaintiffs-Appellants,

v.

Marvin L. PLENERT, in his official capacity as Regional Director, Region One, Fish and Wildlife Service, U.S. Department of the Interior; John F. Turner, in his official capacity as Director, Fish and Wildlife Service, U.S. Department of the Interior; Bruce Babbitt, in his official capacity as Secretary, U.S. Department of the Interior, Defendants-Appellees.

No. 94-35008.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 7, 1995.

Decided Aug. 24, 1995.

William F. Schroeder, Schroeder, Hutchens & Sullivan, Vale, OR, for plaintiffs-appellants.

Ellen J. Durkee, U.S. Dept. of Justice, Washington, DC, for defendants-appellees.

Appeal from the United States District Court for the District of Oregon.

Before: PREGERSON*, CANBY, and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

This case requires us to determine whether plaintiffs who assert no interest in preserving endangered species may sue the government for violating the procedures established in the Endangered Species Act. We conclude that they may not.

I.

The plaintiffs are two Oregon ranch operators and two irrigation districts located in that state. They challenge the government's preparation of a biological opinion which concludes that the water level in two reservoirs should be maintained at a particular minimum level in order to preserve two species of fish. The plaintiffs, who make use of the reservoir water for commercial (and recreational) purposes, bring this action under the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C).

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*Judge Tang was originally a member of this panel and heard argument in this case. Judge Tang died prior to circulation of this opinion, and pursuant to General Order 3.2(g), Judge Pregerson was drawn as a replacement. Judge Pregerson was furnished with a tape of the oral argument as well as the briefs and other materials received by the other members of the panel.

The two reservoirs in question are part of the federal government's Klamath Project, which the Bureau of Reclamation administers. The Bureau concluded that the long term operation of the Klamath Project might adversely affect two species of fish: the Lost River and shortnose suckers. Pursuant to the requirements of the ESA, the Bureau consulted with the United States Fish and Wildlife Service in order to assess the impact of the Klamath Project on the fish. 16 U.S.C. § 1536(a)(2).

As a result of the consultation, the Service prepared a biological opinion. 16 U.S.C. § 1536(b)(3)(A). The opinion concluded that unless mitigating actions were taken the "long-term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers." The opinion "recommended a number of measures the [Bureau] could take to avoid jeopardy to the suckers . . . including the recommendations regarding maintaining minimum lake level at issue in this case." The Bureau informed the Service that it accepted the opinion's recommendations and intended to comply with them.

The plaintiffs filed suit for declaratory and injunctive relief in an effort to compel the government to withdraw portions of the biological opinion. Their complaint alleges that there is no evidence to support the opinion's conclusion that the long-term operation of the Klamath project will adversely affect suckers. In fact, the complaint alleges that the evidence shows that the fish are "reproducing successfully" and are not in need of special protection. The complaint then explains that the plaintiffs' objective in seeking to prevent the government from raising the minimum reservoir levels is to ensure that more

water will be available for their own commercial (and recreational) use. In short, they wish to use for their own purposes some of the water that the government maintains is needed to ensure the survival of the suckers.

The complaint alleges that in preparing the opinion, the government violated the consultation provisions set forth in 16 U.S.C. § 1536(a) of the ESA. It also alleges that the government violated 16 U.S.C. § 1533(b)(2) of the ESA by failing to consider the economic impact of its determination that the reservoirs constituted critical habitats for the suckers. They bring related claims pursuant to the APA and NEPA.

The government moved to dismiss the complaint for lack of standing. The district court concluded that the plaintiffs' interest in utilizing the Klamath water for commercial and recreational purposes "conflict[s] with the Lost River and shortnose suckers' interest in using water for habitat." Accordingly, it concluded that the plaintiffs lacked standing because their claims were premised on "an interest which conflicts with the interests sought to be protected by the Act."

II.

The issue before us is not whether the plaintiffs have satisfied the constitutional standing requirements but whether their action is precluded by the zone of interests

test, the prudential standing limitation that the district court deemed dispositive.[1]

The zone of interests test first appeared as a standing requirement in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 829-30, 25 L.Ed.2d 184 (1970). There, the Court held that a plaintiff seeking judicial review under the Administrative Procedure Act (APA) must show that "the interest sought to be protected by [him was] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153, 90 S.Ct. at 830. In the decade that followed, the test appeared to be on the verge of being abandoned. However, in 1987, the Court resuscitated it, offering an "exegesis" regarding when the test applies and how a court should determine whether it has been met. *See Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 410, 107 S.Ct. 750, 762-63, 93 L.Ed.2d 757 (1987) (Stevens, J. concurring in part).

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[1] We note that the zone of interests test applies even to plaintiffs who have established constitutional standing premised on a procedural injury. *See Douglas County v. Babbitt*, 48 F.3d 1495, 1500-1501 (9th Cir.1995) (applying the prudential zone of interests test after concluding that the plaintiffs had procedural standing to assert a claim) (citations omitted); *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 447 (9th Cir.1994) (same). Accordingly, we need not address whether the plaintiffs have procedural, or as it is sometimes known, "footnote seven" standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-573 n. 7, 112 S.Ct. 2130, 2142-2143 n. 7, 119 L.Ed.2d 351 (1992). *See also Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 921 n. 2 (D.C.Cir.1989) (explaining that standing may be decided on prudential grounds without first undertaking the constitutional inquiry).

In a lengthy footnote, the *Clarke* Court made it clear that some form of the zone test applies even in cases which are not brought under the Administrative Procedure Act. However, it cautioned that "[w]hile inquiries into reviewability or prudential standing in other contexts may bear some resemblance to a 'zone of interest' inquiry under the APA, it is not a test of universal application." *Clarke*, 479 U.S. at 400 n. 16, 107 S.Ct. at 757 n. 16. Perhaps because the Court did not proceed to explain how the test might differ when applied to non-APA actions, our court, like most others, has continued to apply the traditional zone of interests test to such actions, as well as to APA cases. *See, e.g., Central Arizona Water Conservation District v. EPA*, 990 F.2d 1531, 1538-39 (9th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 94, 126 L.Ed.2d 61 (1993) (*Clean Air Act*); *Self-Insurance Institute v. Korioth*, 993 F.2d 479, 484 (5th Cir.1993) (preemption); *ANR Pipeline v. Corporation Commission of State of Oklahoma*, 860 F.2d 1571, 1579 (10th Cir.1988), *cert. denied*, 490 U.S. 1051, 109 S.Ct. 1967, 104 L.Ed.2d 435 (1989) (same); 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3531.7 (Supp.1993). We follow that practice here.

Clarke's principal relevance to the case before us is its holding regarding when a plaintiff who is not directly subject to the regulatory action that he seeks to challenge falls within the zone of interests.[2] As to such plaintiffs,

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[2] None of the plaintiffs is directly subject to the regulatory action. Rather, it is the Bureau of Reclamation which would be required to act if any rules regarding reservoir water levels are ultimately adopted. We do not consider here when a directly regulated entity, or a party standing in the shoes of such an entity, would have standing.

Clarke holds that "the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399, 107 S.Ct. at 757; *see also Central Arizona*, 990 F.2d at 1538-39 (9th Cir.1993) (quoting same).

Clarke explains that the zone of interests test simply provides a method of determining whether Congress intended to permit a particular plaintiff to bring an action. As the *Clarke* Court made clear, "at bottom the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." *Clarke*, 479 U.S. at 400, 107 S.Ct. at 757. Thus, Clarke concludes that the statutory purposes should be divined by considering the particular statutory provision that underlies the complaint within "the overall context" of the act itself. *Clarke*, 479 U.S. at 401, 107 S.Ct. at 758.

III.

We have previously applied the zone of interests test to claims brought directly under the ESA. *See Pacific Northwest Generating Co-Op v. Brown*, 38 F.3d 1058, 1065 (9th Cir.1994); *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1581 & n. 8 (9th Cir.1993). However, the plaintiffs contend that these cases do not conclusively demonstrate that the zone of interests test applies here. They argue that the question of the test's application is an open one because our past cases did not consider whether the ESA's citizen-suit provision overrides the limitation on standing that the test imposes. 16 U.S.C. § 1540(g); *see*

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979) (holding that Congress may extend standing under a statute to the limits of Article III).[3] The provision in question authorizes "any person [to] commence a civil suit on his own behalf – a) to enjoin any person, including the United States [and its agencies], who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof. . . ." *See* 16 U.S.C. § 1540(g).

We need not rely on our decisions in *Mt. Graham* and *Pacific Northwest*. Rather, notwithstanding the broad language of the citizen-suit provision, we directly reject the plaintiffs' contention that it renders the zone of interests test inapplicable to claims brought under the ESA.[4] Our

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[3] There is a division in the circuits as to whether the zone of interests test applies to ESA suits. The District of Columbia Circuit, notwithstanding the citizen-suit provision, has expressly held that the zone of interests test applies. *State of Idaho By and Thru Idaho Public Utilities Commission v. ICC*, 35 F.3d 585, 592 (D.C.Cir.1994); *see also Humane Society of the United States v. Hodel*, 840 F.2d 45 (D.C.Cir.1988); *National Audubon Society v. Hester*, 801 F.2d 405, 407 (D.C.Cir.1986). By contrast, the Eighth Circuit has concluded that ESA's citizen-suit provision necessarily abrogated any zone of interests test. *See Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (8th Cir.1988), opinion after remand, 911 F.2d 117 (8th Cir.1990), *rev'd on other grounds sub nom., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

[4] We note that, whether or not the zone of interests test applies, the class of plaintiffs that Congress had in mind was necessarily more limited than the literal language of the citizen-suit provision suggests. As *Lujan* makes clear, Congress may not permit suits by those who fail to satisfy the constitutionally-mandated standing requirements. For that reason, suits under the ESA, no less than suits under any statute, are clearly not available to "any person" in the broadest possible sense of that term. *See Lujan*, 504 U.S. at 570-580, 112 S.Ct. at 2142-2146.

conclusion follows from the fact that our court, and others, have regularly employed the zone of interests test in determining standing despite Congress' enactment of expansive citizen-suit provisions.

For example, in *Gonzales v. Gorsuch*, 688 F.2d 1263, 1266 (9th Cir.1982), we considered whether a plaintiff had standing under the Clean Water Act's citizen-suit provision to complain that the EPA was unlawfully expending funds for purposes other than the improvement of water quality. In answering the question, we considered not only the provision of the statute which permitted "any citizen" to sue for a violation of the Act, but also the legislative history. We concluded that the plaintiff had standing because the citizen-suit provision was "intended to grant standing to a nationwide class, comprised of citizens *who alleged an interest in clean water.*" *Id.* (emphasis added).

Subsequent to *Gonzales*, we concluded that the Clean Water Act's citizen-suit provision did not confer standing on a plaintiff who claimed that the government's failure to comply with the statute deprived him of grant funds. *See Dan Caputo Co. v. Russian River County Sanitation*, 749 F.2d 571, 575 (9th Cir.1984). We based our holding on the fact that the plaintiff's injury did not "arise from an interest in the environment," and the fact that he did "not seek to vindicate environmental concerns." *Id.*

We applied a similar analysis in construing a different statute. In *Alvarez v. Longboy*, 697 F.2d 1333, 1337 (9th Cir.1983), we considered whether a provision of the Farm Laborer Contractor Registration Act (FLCRA) that permitted suit by "[a]ny person claiming to be aggrieved" by a violation of the act conferred standing on migrant workers to sue farm labor contractors with whom they had no contract. *See* 7 U.S.C. § 2050a(a).[5] We concluded that it did, but only after carefully considering the overall purposes of the act to determine whether the particular plaintiff fell within the zone of interests that the statute protected. *Alvarez*, 697 F.2d at 1337-38.

The Eleventh Circuit employed the same approach in construing the FLCRA. *Davis Forestry Corporation v. Smith*, 707 F.2d 1325, 1328 (11th Cir.1983). After analyzing the purposes of the act, the court concluded that the provision authorizing suits under the FLCRA did not confer standing on competitors of farm labor contractors to bring an action for a violation of the statute. It explained that their claimed injury fell outside "the zone of interests sought to be protected" by the statute. *Id.* In so concluding, the court explained that:

> The FLCRA was designed to alleviate a parade of horribles being inflicted upon farm laborers (primarily migrant farm workers). While "any person" may be read to include many possibilities, we do not find any basis for extending it

[5] The inclusion of the language "claiming to be aggrieved" does not distinguish the statute from the one we consider here. As we have explained, the constitution necessarily limits standing to plaintiffs who are, at the least, aggrieved; i.e., persons who suffer constitutional injury.

> to [the plaintiff] for the type of claim alleged here.

Id. at 1329.

In sum, the fact that a statute contains a citizen-suit provision does not necessarily establish that Congress intended that any particular plaintiff have standing to assert a violation. In light of our consistent use of the zone of interests test in determining the standing of plaintiffs who have sued under citizen-suit provisions, we hold that the ESA does not automatically confer standing on every plaintiff who satisfies constitutional requirements and claims a violation of the Act's procedures. A contrary ruling would permit plaintiffs to sue even though their purposes were plainly inconsistent with, or only "marginally related" to, those of the Act. *Clarke*, 479 U.S. at 399, 107 S.Ct. at 757. Thus, we apply the zone of interests test here.

IV.

Having concluded that the zone of interests test applies, we must next determine whether the ESA protects plaintiffs who assert an interest of the type asserted here. We answer that question in the negative, holding that only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA. Because the plaintiffs have not alleged such an interest in their complaint, they do not have standing.

In reaching our conclusion, we follow the approach that we have adopted in applying the zone of interests test to claims brought pursuant to other environmental

statutes. In those cases, we declined to confer standing on plaintiffs who asserted interests similar to those that underlie the claims in this case; we concluded that the asserted interests were not tied to the environmental purposes served by the respective statutes. For example, as we have explained supra at page 10656, we denied standing under the Clean Water Act to a plaintiff who sought grant funds but did not assert an interest that "ar[o]se from an interest in the environment" or "environmental concerns." *See Dan Caputo Co. v. Russian River County Sanitation,* 749 F.2d 571, 575 (9th Cir.1984). Similarly, we held that plaintiffs do not have standing under NEPA to protect "purely" economic interests, because the environmental purposes of the Act would not be furthered by permitting suits premised on such interests. *See Nevada Land Action Ass'n v. U.S. Forest Service,* 8 F.3d 713, 716 (9th Cir.1993).

We see no reason why the ESA should be construed in a different manner from either NEPA or the Clean Water Act.[6] The overall purposes of the ESA are

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[6] *Central Arizona Water Conservation Dist. v. United States Environmental Protection Agency,* 990 F.2d 1531 (9th Cir.1993), is not inconsistent with our analysis. In *Central Arizona,* although we conferred standing on water districts that sued to recoup the "compliance costs" imposed by the Clean Air Act, we did not consider the general question of whether the Clean Air Act protects the interests of plaintiffs who assert no interest in clean air. Instead, in our opinion, we concluded that the districts had standing because they were contractually "require[d]" to pay a substantial portion of the multi-million dollar "compliance costs" that the Act imposed directly on the Bureau of Reclamation. *Central Arizona,* 990 F.2d at 1537-1539. In *Central Arizona,* the water districts stood in the same position as the Bureau of

singularly devoted to the goal of ensuring species preservation; they do not embrace the economic and recreational interests that underlie the plaintiffs' challenge. Our conclusion is based in part on the Supreme Court's own exhaustive review of the purposes of the ESA in *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 184, 98 S.Ct. 2279, 2296-97, 57 L.Ed.2d 117 (1978) (emphasis added). There, the Court concluded that:

> [t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. That is reflected not only in the stated policies of the Act, but in literally every section of the statute.

See also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, ___ U.S. ___, ___, 115 S.Ct. 2407, 2413, 132 L.Ed.2d 597 (1995) (quoting same). The Court went on to point out that even the citizen-suit provision, on which the plaintiffs rely, was designed to serve the goal of species protection by permitting *"interested persons"* to sue to enforce the Act. *Id.* at 181, 98 S.Ct. at 2295 (emphasis added).

Moreover, a review of the section of the ESA that sets forth the Act's purposes bears out the Court's analysis. That section provides no basis for concluding that the plaintiffs' interest in obtaining water that the government deems critical to the survival of endangered fish is a

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Reclamation, the entity that the Clean Air Act regulated directly. As we noted earlier, the zone of interests test does not apply in such circumstances. *Clarke,* 479 U.S. at 400, 107 S.Ct. at 757; *supra,* note 2.

protected one. Rather, the statute declares that its purposes are:

> to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

16 U.S.C. § 1531(b). It was a similar declaration of purpose that we relied upon in concluding that a plaintiff's economic interest fell outside the zone of interests protected by NEPA. *See Nevada Land Action*, 8 F.3d at 716 (quoting the purposes section of NEPA). Given that the clear purpose of the ESA is to ensure the protection of endangered species, we conclude that suits by plaintiffs who are interested only in avoiding the burdens of that preservation effort "are more likely to frustrate than to further statutory objectives." *Nevada Land Action*, 8 F.3d at 716 (quoting *Clarke*, 479 U.S. at 397 n. 12, 107 S.Ct. at 756 n. 12).

Our conclusion echoes some of the views that we recently expressed in *Pacific Northwest*. In *Pacific Northwest*, hydropower purchasers challenged the government's preparation of a biological opinion that recommended regulating water flow in order to protect endangered salmon. In one of their claims, the hydropower purchasers contended that the opinion's recommendations would yield only "dubious benefit to the listed species" and did not adequately consider the impact that the proposed regulations would have on their

industry. *Pacific Northwest*, 38 F.3d at 1067. We explained that such a claim went beyond the bounds of the standing that the ESA confers.

> On analysis, a portion of this claim goes beyond the basis for the plaintiffs' standing because it focuses on the increases in cost to hydropower operations. The plaintiffs are entitled to standing because preservation of the salmon will, in the long run, reduce their cost. *But the plaintiffs are not entitled to standing simply to complain about the additional cost imposed on hydropower. Nothing in the Endangered Species Act confers a cause of action for that purpose.*

Pacific Northwest, 38 F.3d at 1067 (emphasis added). Pacific Northwest said, in effect, that as to a portion of their claim, the plaintiffs were not entitled to standing because they failed to assert an interest in preserving a threatened or endangered species.[7]

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[7] *Pacific Northwest* did not clearly state whether it was concluding that the ESA denied the plaintiffs standing or a cause of action. However, the distinction between "standing" and "cause of action" is often "only a matter of semantics," *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 467, 94 S.Ct. 690, 697, 38 L.Ed.2d 646 (1974), (Douglas, J., dissenting); *Pacific Northwest*, 38 F.3d at 1067, and the terms are sometimes used interchangeably or confused. *See, e.g., DKT Memorial Fund v. Agency for International Development*, 887 F.2d 275, 286 (D.C.Cir.1989) (explaining that zone of interests standing test and cause of action inquiry often meld into one) (quoting *Cardenas v. Smith*, 733 F.2d 909, 915 (D.C.Cir.1984)); *see also McMichael v. County of Napa*, 709 F.2d 1268, 1273 (9th Cir.1983) (Kennedy, J. concurring). Thus, *Pacific Northwest*'s interchangeable use of the two terms does not constitute a departure from our past practice of deeming the question of who may sue for a statutory violation as one that concerns standing. *See Alvarez v.*

Here, the plaintiffs make no allegation that the government's recommendations will harm the Lost River or shortnose suckers. Instead, they argue that the actions proposed in the biological opinion are not necessary to preserve the fish. In their claims regarding consultation and designation of critical habitat, they seek only to obtain a greater share of the water and do not contend that compliance with the Act will *improve* the fish's lot. Indeed, they tell us that the suckers are doing just fine. Thus, their complaint belies any assumption that they seek compliance with the statute in order to further the goal of species preservation. The complaint instead is premised on the contrary position that the fish are "reproducing successfully" and will not be adversely affected by the long-term operation of the Klamath project.

In short, the plaintiffs do not seek to further the statutory purpose. Nor do they allege any community of interest of any kind between themselves and the suckers. To the contrary, they claim a competing interest – an interest in using the very water that the government believes is necessary for the preservation of the species. Because the plaintiffs' interests consist solely of an economic (and recreational) interest in the use of water, because their claims are at best "marginally related" to the purposes that underlie the Act, *Clarke*, 479 U.S. at 399,

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Longboy, 697 F.2d 1333, 1337 (9th Cir.1983); *Gonzales v. Gorsuch*, 688 F.2d 1263, 1266 (9th Cir.1982); *Dan Caputo Co. v. Russian River County Sanitation*, 749 F.2d 571, 575 (9th Cir.1984). Semantics aside, *Pacific Northwest* followed our traditional approach in assessing the interests asserted by the plaintiffs in that case.

107 S.Ct. at 757, and because, as the district court determined, their interests are inconsistent with the Act's purposes, we conclude that they lack standing.[8]

Finally, we are aware that the ESA specifically provides that the government should consider a variety of factors – including economic ones – in designating critical habitat for a species. *See* 16 U.S.C. § 1533(b)(3). The Act's inclusion of such directives does not alter our analysis. We do not believe that in setting forth the factors to be weighed in formulating a plan for protecting species, Congress intended to do more than ensure a rational decision-making process by providing guidance for government officials. Certainly, it did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him. *See Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922 (D.C.Cir.1989) (holding that the fact that Congress mandates that certain methods be used to achieve its goals does not express its intent to benefit every person who has an interest in those methods being followed). To interpret the statute in the manner suggested by plaintiffs would be to transform provisions designed to further species protection into the means to frustrate that very goal. *See Clarke*, 479 U.S. at 397 n. 12, 107 S.Ct. at 756 n. 12. Accordingly, we hold that the plaintiffs have no standing under the ESA.

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[8] The fact that the ranchers allege that they have an aesthetic and recreational interest in lower lake levels does not change anything. That interest – even though not economic in nature – does not serve the purpose of preserving any endangered species. Thus, it is not an interest protected by the ESA.

V.

Because the plaintiffs have failed to assert an interest protected by the ESA, they necessarily have no standing under the APA. *Yesler Terrace*, 37 F.3d at 447 (zone of interests test applies to the APA). We also need not consider whether the plaintiffs have standing under the National Environmental Policy Act. Under the doctrine of hypothetical jurisdiction, we may dismiss a claim on the merits, if they are clear, in order to avoid a difficult jurisdictional inquiry. *Clow v. U.S. Department of Housing & Urban Development*, 948 F.2d 614, 616-17 n. 2 (9th Cir.1991). Here, as the plaintiffs concede, *Douglas County* squarely holds that no NEPA claim lies for a violation of the ESA's provisions for determining critical habitat. *Douglas County*, 48 F.3d at 1502. Accordingly, even if we assume that the plaintiffs have standing under NEPA, they have failed to state a claim under that Act.

VI.

Because the plaintiffs lack standing to sue under either the ESA or the APA, and because they have failed to state a claim under NEPA, we affirm the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRAD BENNETT, et al., Plaintiffs, v. MARVIN L. PLENERT, et al., Defendants.	Civil No. 93-6076-HO ORDER (Filed ___)

Plaintiffs filed this action for declaratory and injunctive relief under the Endangered Species Act (ESA) citizens suit provision, 16 U.S.C. § 1540(g)(1)(c), alleging violations of ESA, 16 U.S.C. §§ 1531 et seq., and its implementing regulations, 50 CFR part 402, the National Environmental Policy Act of 1969, as amended (NEPA), 42 U.S.C. § 4321, et seq., and the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq.

Plaintiffs seek to compel defendants to withdraw portions of a biological opinion issued by the Fish and Wildlife Service (FWS) on July 22, 1992, pursuant to the agency consultation provisions of ESA.

Plaintiffs allege "(t)he Biological Opinion improperly concludes that continued operation of Clear Lake reservoir in Northern California and Gerber reservoir in Southern Oregon by the Bureau of Reclamation ("BOR") jeopardizes two endangered species, the Lost River Sucker and the shortnose sucker." As a consequence of its erroneous jeopardy conclusion, the Biological Opinion improperly seeks to impose restrictions on the BOR's

operation of Clear Lake reservoir and Gerber reservoir." Complaint (#1), p. 2. Plaintiffs allege that the "restrictions on lake levels imposed by the Biological Opinion adversely affect plaintiffs by substantially reducing the quantity of available irrigation water." *Id.*, p. 9.

Plaintiffs also allege "(b)y imposing restrictions on lake levels in Clear Lake and Gerber Reservoirs, the Biological Opinion implicitly determines critical habitat for the endangered suckers" without consideration of the economic impact of that determination, as required by section 4 of ESA, 16 U.S.C. § 1533(b)(2)," *Ibid*, and that designation of critical habitat is a major federal action to which NEPA procedural requirements apply. Complaint (#1), p. 10.

Defendants move to dismiss the complaint (#4) on the ground that plaintiffs lack standing. Defendants maintain that the biological opinion "is a non-binding opinion which in and of itself does not cause any injury to plaintiffs." Federal Defendants' Memorandum (#4), pp. 2-3. Defendants also contend that plaintiffs lack standing because their alleged injury is not "a result of the Secretary's *failure* to conserve the two species of fish" nor can it "be fairly traced to an alleged *violation* of the Secretary's obligations under ESA section 7(a)(1)." Federal Defendants Reply (#9), p. 6. Defendants contend plaintiffs' *de facto* designation of critical habitat claim should be denied because the "issuance of a biological opinion does not constitute a designation of critical habitat." Federal Defendants' Memorandum (#4), p. 3.

Statutory requirements: Section 7 of ESA requires each federal agency to "insure that any action authorized,

funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536 (a)(2).

To fulfill this obligation, agencies are required to consult with the Secretary of the Interior (through the FWS) or the Secretary of Commerce (through the National Marine Fisheries Service – "NMFS") depending on the species involved. The two secretaries have developed regulations governing the consultation process. *See* 50 CFR Part 402.[1]

If during informal consultation the agency determines, with the written concurrence of the Service, that the action is not likely to adversely affect a listed species of critical habitat, the consultation process is terminated and no further action is necessary. 50 CFR §§ 402.13(a); 402.14(b)(1).

If the agency determines that the proposed action may affect a listed species, formal consultation is required. 50 CFR § 402.14(a). Following consultation, the Service issues a biological opinion "detailing how the agency action affects the species or its critical habitat." 16 U.S.C. §1536(b)(3)(A). If jeopardy or adverse modification is found, the Secretary "shall suggest those reasonable and prudent alternatives" which he believes would not

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[1] The species at issue in this case are under the auspices of the Secretary of the Interior. Therefore, all references to "the Secretary" refer to the Secretary of the Interior; references to "the Service" refer to FWS.

violate the agency's duty under section 1536(a)(2). *Ibid.* *See also,* 50 CFR Subpart A – § 402.01.

Although the primary responsibility for implementing section 7 of ESA is on the Secretary, the ultimate obligation to comply with the substantive obligation under 16 U.S.C. §1536 (a)(2) is on the agency.

> Federal agencies are required to consult and obtain the assistance of the Secretary before taking any actions which may affect endangered species or critical habitat. However, once an agency has had meaningful consultation with the Secretary of Interior concerning actions which may affect an endangered species the final decision of whether or not to proceed with the action lies with the agency itself. Section 7 does not give the Department of Interior a veto over the actions of other federal agencies provided that the required consultation has occurred.

National Wildlife Federation v. Coleman, 529 F.2d 359, (5th Cir. 1976), *cert. den.* 429 U.S. 979 (1976).

See also, remarks of Senator Tunny, floor manager of the ESA bill in the United States Senate. ["So, as I read the language (of section 7), there has to be consultation. However, the Bureau of Public Roads or any other agency would have the final decision as to whether such a road should be built. That is my interpretation of the legislation at any rate." 119 Cong. Rec., S. 14536 (July 24, 1973).]

The Ninth Circuit has stated in describing the ESA process: "If the biological opinion concludes that the proposed action would jeopardize the species or destroy or adversely modify critical habitat . . .the action may not

go forward unless the F & WS can suggest an alternative that avoids such jeopardization, destruction, or adverse modification. *Id.* §1536(b)(3)(A)." *Thomas v. Petersen,* 753 F.2d 754, 763 (9th Cir. 1985).

16 U.S.C. § 1536(b)(3)(A) does not necessarily support the *Thomas* court's conclusion that "the action may not go forward." In addition, I find this dicta in *Thomas v. Petersen* is not controlling in view of *Sierra Club v. Marsh,* 816 F.2d 1376 (9th Cir. 1987). In that case, the Army Corp of Engineers declined the FWS's request to initiate the consultation process. Citing *National Wildlife Federation v. Coleman, supra,* the court held: "The ESA does not give the FWS the power to order other agencies to comply with its requests or to veto their decisions." *Id.,* p. 1386.

The interpretation that biological opinions are not binding on the action agency is also supported by the finding in *Pyramid Lake Paiute Tribe v. U.S. Dept of Navy,* 898 F.2d 1410, 1418 (9th Cir. 1990) that "non Interior" agencies have the discretion whether to implement conservation recommendations put forth by the FWS. *See also,* 50 CFR §402.14(j) ["Conservation recommendations. The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force."].

See also, Roosevelt Campobello Intern. Park v. U.S.E.P.A., 684 F.2d 1041, 1049 (1st Cir. 1982). ["An agency's duty to consult with the Secretary of Commerce or Interior, depending on the particular endangered species, does not divest it of discretion to make a final decision that 'it has taken all necessary action to insure that its actions will

not jeopardize the continued existence of an endangered species.' "] Citing *National Wildlife Federation v. Coleman, supra.*

Based on the foregoing, I find that the Secretary's biological opinion is advisory in nature and does not compel compliance with its recommendations or require agencies to act or refrain from acting in any particular manner.[2]

Consultation between FWS and BOR: In this case, the BOR requested formal consultation with FWS after completing a biological assessment which found that three listed species may be affected by the long term operation of the Klamath Basin Project. *See,* Federal Defendants' Memorandum (#4), Exhibit 1.

On July 22, 1991, FWS issued its biological opinion finding that the long-term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers. Federal Defendants' Memorandum (#4), Exhibit 5, p. 2. The Service recommended a number of measures the BOR could take to avoid jeopardy to the suckers, *Id.,* pp. 36-39, including the recommendations regarding maintaining minimum lake levels at issue in this case.

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[2] Although the Regional Director of BOR indicated to the Regional Director of FWS that the BOR "intends to comply with the *requirements* of the Biological opinion issued on July 22, 1992, concerning the long-term operation of the Klamath Project." (emphasis added) Federal Defendants Memorandum (#4), Exhibit 6.

On August 19, 1992, the BOR notified FWS that it accepted the conclusions of the biological opinion and that it intended to comply with the recommendations of the Service. Federal Defendants' Memorandum (#4), Exhibit 6.

Standing: The "irreducible constitutional minimum" of standing requires three elements: (1) an injury in fact – an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of – the injury must be "fairly traceable to the challenged action of the defendant and not the result of some third party not before the court; and, (3) it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* ___ U.S. ___, 112 S.Ct. 2130, 2136 (1992).[3]

When a plaintiff's challenge to an agency action or inaction is premised upon the allegedly unlawful regulation or lack of regulation of someone else, standing is "substantially more difficult" to establish. *Id.,* p. 2137. Where an injury results from "the independent action of some third party not before the court," a federal court lacks jurisdiction under Article III. *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 41 (1976). [quoting *Allen v. Wright,* 468 U.S. 737, 758 (1984).]

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[3] In *Lujan v. Defenders of Wildlife,* the Supreme Court's analysis of standing to support an ESA claim was limited to the application of Article III (constitutional) requirements. *Compare, Lujan v. National Wildlife Federation,* 497 U.S. 871, 883 (1990) (applying 'zone of interests' test to NEPA-FLMPA/APA claims).

Discussion: Defendants contend plaintiffs' complaint "fails to allege an injury that can fairly be traced to the challenged action, or that is likely to be redressed by a decision in their favor." Federal Defendants' Memorandum (#4), p. 10. Defendants argue that plaintiffs' alleged injury arises from restrictions on the use of water from the Klamath Project. "These restrictions, however have not been imposed by the Fish and Wildlife Service; rather, the Bureau of Reclamation, who plaintiffs have not joined, and is consequently not before this court." *Id.*, p. 11.

Defendants argue the biological opinion is not reviewable under the APA because it is "merely a recommendation, that the action agency may choose to adopt, or reject" and not a final agency action. Federal Defendants' Memorandum (#4), p. 14.

In plaintiffs' reply to defendants' motion to dismiss (#8), plaintiffs contend their "claim is not against the Fish and Wildlife Service as defendants state. It is against the Secretary of the Interior" and that "(t)he process giving rise to this action is the 'review' process, not the 'consultation' process required by Congress." Plaintiffs' Reply (#8), p. 2.

I agree with defendants that plaintiffs' reply "recharacterizes" their claims under ESA. *See* Federal Defendants' Reply (#9). However, because a motion to dismiss requires the court to determine whether plaintiffs have alleged "any set of facts in support of his claim which would entitle (them) to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), it is appropriate to consider plaintiffs' "recharacterized" claim.

However, I find it is not necessary to decide these issues because plaintiffs fail to meet a more fundamental standing requirement.

Plaintiffs interest in this case, the use of Klamath Project water for "recreational, aesthetic and commercial purposes," Complaint (#1), p. 4, conflict with the Lost River and shortnose suckers' interest in using the water for habitat. Plaintiffs do not have standing under ESA based on an interest which conflicts with the interests sought to be protected by the Act.

This court recently rejected a claim similar to plaintiffs' claim in this case. In *Pacific Northwest Generating Cooperative v. Brown*, Civ Nos. 97-973, 92-1260, and 92-1264 (D. Or. April 1, 1993), Judge Marsh held that plaintiff hydropower users lacked standing to challenge a biological opinion issued by the National Marine Fisheries Service regarding the effects of the Columbia River Power System hydropower operations on endangered species of salmon. The court held that the injury alleged by plaintiffs as a result of the consultation (an increase in the cost of hydropower) lacked Article III standing requirements of causation and redressability. The court further held that where plaintiffs' interests conflicted with the species they purport to represent in their claims, the case or controversy requirement of Article III was not satisfied and plaintiffs lacked standing.

> When [plaintiffs] invoke the Endangered Species Act and seek to specifically enforce its terms, ultimately they run headlong into a classic conflict of interest – by invoking the ESA they purport to represent the interest of the listed species. Yet, when push comes to shove, if

> the resources become so scarce that truly hard choices must be made, plaintiffs' asserted interests in the listed species may yield to the basis for their claimed "injury" for standing under ESA – their interest in power and water for hydroelectric use.
>
> *Pacific Northwest Generating Cooperative v. Brown, supra,* p. 62.

Similarly, the "zone of interest" standing requirement would preclude review under the APA. ESA is designed "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, and to provide a program for the conservation of such endangered and threatened species. . . . " 16 U.S.C. §1531(b). Therefore, the recreational, aesthetic, and commercial interests advanced by plaintiffs do not fall within the zone of interests sought to be protected by ESA.

Conclusion: Based on the reasoning in *Pacific Northwest Generating Cooperative v. Brown, supra,* Defendants' motion to dismiss (#4) based on lack of standing is allowed.[4]

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[4] I am not persuaded that the Secretary's biological opinion at issue in this case constitutes a *"de facto"* determination of critical habitat for the Lost River and shortnose suckers, for purposes of plaintiff's third and fourth claims for relief, particularly in view of *Wood, et al. v. Plenert, et al.*, Civ. No 91-6496-TC (D. Or.) currently pending in this court. However, nothing in this opinion should be construed as precluding a NEPA claim independent of ESA, i.e., if the implementation of the biological opinion was found to be a "major federal action . . . ," NEPA procedural requirements may apply. However, such a determination could not be premised upon the assumption that the biological opinion constitutes designation of critical habitat under 16 U.S.C. § 1533.

DATED this 18th day of November, 1993.

/s/ Michael R. Hogan
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRAD BENNETT, et al

Plaintiffs.

v.

MARVIN L. PENERT, et al

Defendants.

Civil No.
93-6076-HO

JUDGMENT

This action is dismissed.

Dated: November 19, 1993.

Donald M. Cinnamond, Clerk

by /s/ Lea Force
Lea Force, Deputy

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BRAD BENNETT, an individual; MARIO GIORDANO, an individual; LANGELL VALLEY IRRIGATION DISTRICT, a political subdivision of the State of Oregon; HORSEFLY IRRIGATION DISTRICT, a political subdivision of the State of Oregon, Plaintiffs, vs. MARVIN L. PLENERT, in his official capacity as Regional Director, Region One, Fish and Wildlife Service, United States Department of the Interior;	Case No. 93-6076-HO COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

JOHN F. TURNER, in his official capacity as Director, Fish and Wildlife Service, United States Department of the Interior; and BRUCE BABBITT, in his official capacity as Secretary, United States Department of the Interior,

Defendants.

PRELIMINARY STATEMENT

1. This is an action for declaratory judgment. Plaintiffs seek to compel Defendants to withdraw portions of the biological opinion issued by the Fish and Wildlife Service on July 22, 1992, ("the Biological Opinion"), pursuant to the agency consultation provisions of the Endangered Species Act ("ESA"). A copy of the Biological Opinion is attached hereto and incorporated herein as Exhibit B. The Biological Opinion improperly concludes that continued operation of Clear Lake reservoir in northern California and Gerber reservoir in southern Oregon by the Bureau of Reclamation ("BOR") jeopardizes two endangered species, the Lost River sucker and the shortnose sucker. As a consequence of its erroneous jeopardy conclusion, the Biological Opinion improperly seeks to impose restrictions on the BOR's operation of Clear Lake reservoir and Gerber reservoir. In addition, until the Biological Opinion was issued, critical habitat for the Los River sucker and the shortnose sucker has never been determined by defendants, and these restrictions are invalid for that reason as well. On information and belief, Plaintiffs allege that the BOR will abide by the restrictions imposed by the Biological Opinion.

2. This action arises under and alleges violations of the ESA, 16 U.S.C. §§ 1531 *et seq.*, and its implementing regulations, 50 C.F.R. Part 402, the National Environmental Policy Act of 1969 (as amended) (the "NEPA"), 42 U.S.C. 4321, et seq., and the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 551 *et seq.*

JURISDICTION AND VENUE

3. Jurisdiction over this action is conferred by 16 U.S.C. § 1540 (g)(1)(C) (ESA citizens' suit) and 28 U.S.C. §§ 1331 (federal question), and 2201 (declaratory relief). A copy of plaintiffs' 60-day Notice of Intent to Sue, dated November 12, 1992, is attached hereto as Exhibit A.

4. Venue is properly in this Court pursuant to 28 U.S.C. § 1391(e), as some or all of the plaintiffs reside in this district and a substantial part of the events or omissions giving rise to the claim occurred in this district.

PARTIES

5. The plaintiffs in this action are:

A. Brad Bennett ("Bennett"), a rancher who resides near Bonanza, Oregon, and who receives most of his irrigation water from Clear Lake reservoir. Brad Bennett's ranch is located within the Horsefly Irrigation District.

B. Mario Giordano ("Giordano"), a rancher who resides near Bonanza, Oregon, and who receives irrigation water from Clear Lake reservoir. Mario Giordano's ranch is located within the Langell Valley Irrigation District.

C. Horsefly Irrigation District ("HID") is a political subdivision of the State of Oregon organized pursuant to Oregon Revised Statutes chapter 545 for the purpose of delivering irrigation water to its patrons within the District. The District is located in Klamath County, Oregon, and it receives irrigation water from Clear Lake reservoir in northern California via the Lost River, pursuant to contracts with the United States. The District office is located in Oregon in the town of Bonanza.

D. Langell Valley Irrigation District ("LVID") is a political subdivision of the State of Oregon organized pursuant to Oregon Revised Statutes chapter 545 for the purpose of delivering irrigation water to its patrons within the District. The District is located in Klamath County, Oregon, and it receives irrigation water from Gerber reservoir via Miller Creek and Clear Lake reservoir in northern California via Lost River, pursuant to contracts with the United States. The District office is located in Oregon near the town of Bonanza, Oregon.

6. Plaintiffs use Gerber reservoir, Clear Lake reservoir, Miller Creek, and Lost River for recreational, aesthetic and commercial purposes, as well as for their primary sources of irrigation water. Plaintiffs' use of Clear Lake reservoir, Gerber reservoir, Miller Creek, and Lost River will be irreparably damaged by defendants' disregard of their statutory duties, as described below, and by the unlawful restrictions placed by defendants on the use of Clear Lake reservoir and Gerber reservoir.

7. Unless the relief prayed for herein is granted, the above-described recreational, aesthetic, commercial, and procedural interests of plaintiffs will be adversely

affected and irreparably injured by the erroneous conclusion of defendants that the BOR's continued operation of Clear Lake reservoir and Gerber reservoir will likely jeopardize the survival of the Lost River sucker and the shortnose sucker unless restrictions are placed on such operation.

8. The defendants in this action are:

A. Marvin L. Plenert, in his official capacity as director of Region One of the Fish and Wildlife Service, United States Department of the Interior. Region One of the Fish and Wildlife Service includes Clear Lake reservoir and Gerber reservoir. The Biological Opinion was issued by the Region One office of the Fish and Wildlife Service.

B. John F. Turner is the Director of the Fish and Wildlife Service, United States Department of the Interior.

C. Bruce Babbitt is the Secretary of the United States Department of the Interior (the "Secretary"). The Secretary is empowered by the ESA to make jeopardy determinations concerning threatened and endangered species pursuant to 16 U.S.C. § 1536(b)(3)(A).

FACTS

9. Clear Lake reservoir and Gerber reservoir were constructed early in the twentieth century in the eastern portion of the Klamath Project by the BOR to provide irrigation water to farmers and ranchers in southern Oregon. Although Clear Lake reservoir and Gerber reservoir are part of BOR's Klamath Project, they are operated separate and distinct from the western portion of the

Klamath Project, which consists of the Klamath River and Upper Klamath Lake in Oregon and Lower Klamath Lake and Tule Lake in California. A diagram showing the bodies of water in the Klamath Project is attached hereto as Exhibit C. The separated systems are different aquariums and aquatic animals within the one cannot naturally move to the other.

10. The Lost River sucker and the shortnose sucker were declared endangered under the ESA in 1988 (53 C.F.R. 27130-27135). Both species have been found in the various bodies of water of the Klamath Project, including Clear Lake reservoir, but only the shortnose sucker has been found in Gerber reservoir.

11. Critical habitat for these species of suckers has never been determined by the Secretary, despite the ESA's mandate that he do so "to the maximum extent prudent and determinable" under 16 U.S.C. § 1533(a)(3) at the same time the Secretary declares them endangered. Defendants are responsible for determining critical habitat.

12. The BOR has been following essentially the same procedures for storing and releasing water from Clear Lake and Gerber reservoirs throughout the twentieth century, up to the present day. No natural phenomenon or human activity has substantially modified the aquatic environments of Gerber reservoir and Clear Lake reservoir since their construction except that the Department of Fish & Game of the State of California installed the Sacramento Perch within the Clear Lake Reservoir.

13. There is no scientifically or commercially available evidence indicating that the populations of endangered suckers in Clear Lake and Gerber reservoirs have declined, are declining, or will decline as a result of any natural phenomena or human activities, including the operations of the BOR in the Klamath Project. To the contrary, the scientifically and commercially available evidence indicates that the populations of endangered suckers in Clear Lake and Gerber reservoirs are not declining and are reproducing successfully.

14. As a result of concerns over population declines of the endangered suckers in the Klamath River system in the Western portion of the Klamath Project, the BOR initiated consultation with the Fish and Wildlife Service in 1990 pursuant to section 7 of the ESA, 16 U.S.C. § 1536. The Biological Opinion is the result of that consultation and was issued pursuant to section 7(b)(3)(a) of the ESA, 16 U.S.C. § 1536(b)(3)(a).

15. The Biological Opinion makes the following conclusion:

> *Biological Opinion*
>
> It is our biological opinion that the long-term operation of the Klamath Project as described under the *Description of the Proposed Action*, is likely to jeopardize the continued existence of the Lost River and shortnose suckers. It is our biological opinion that the proposed Project operation is not likely to jeopardize the continued existence of the bald eagle. Critical habitat has not been designated for any of these three species.
>
> p.2.

16. The Biological Opinion notes that "Both Lost River and shortnose suckers are long-lived, highly fecund, and well adapted to surviving drought conditions." (Biological Opinion, p. 18). The Biological Opinion points out that sucker habitat in Clear Lake differs from that in the western portion of the Project, at Klamath Lake and Upper Klamath Lake, "because Clear Lake appears to have relatively stable sucker populations, has virtually no aquatic vegetation, and exhibits wider fluctuations in lake elevations during most years." (Biological Opinion, p. 18). The Biological Opinion attributes the stability of the sucker populations in Clear Lake to its good water quality, in comparison to the poor water quality in Klamath Lake and Upper Klamath Lake, where sucker populations have declined. (Biological Opinion, p. 18).

17. The Biological Opinion admits that little is known about the endangered sucker population in Gerber reservoir, although a study in May of 1992 found over 200 shortnose suckers with a broad range in size, " . . . which indicates that the population of shortnose suckers in Gerber reservoir has successfully recruited in the last few years . . . " (Biological Opinion, p. 20). The May 1992 study also found some evidence of stress in the collected specimens, possibly due to low reservoir levels. (Biological Opinion, p. 20). The Biological Opinion notes that 1992 was one of a series of low water years, and that the 17-foot depth of Gerber reservoir at its lowest level, likely to be reached in October, 1992, should be sufficient to maintain a population of suckers. (Biological Opinion, p. 20).

18. Without any supporting citations, the Biological Opinion states:

> Formally (*sic*) stable populations, such as those in Clear Lake, are now threatened by drought related stresses. Without proposed improvements in water quality and sucker habitat, the future of these suckers is imperiled and the present status of habitat condition makes extinction in most of their current range highly likely.
>
> p. 26.

19. Despite its conclusion that both Clear Lake and Gerber reservoirs have stable populations of endangered suckers which are reproducing successfully during the present drought years, the Biological Opinion imposes restrictions on the withdrawal of water from both reservoirs. Except for compromise years, the restrictions applicable to Clear Lake reservoir include a minimum lake level of 4524.0 feet between February 1 and April 15 annually, during the spawning season, and a minimum lake level of 4523.0 feet during the remainder of the year. (Biological Opinion, at 37). Except for compromise years, the restrictions applicable to Gerber reservoir permit no water releases below 4799.6 feet. (Biological Opinion, at 38).

20. There is no commercially or scientifically available evidence indicating that the restrictions on lake levels imposed in the Biological Opinion will have any beneficial effect on the stable, successfully reproducing populations of suckers in Clear Lake and Gerber reservoirs.

21. The restrictions on lake levels imposed in the Biological Opinion adversely affect plaintiffs by substantially reducing the quantity of available irrigation water.

22. By imposing restrictions on lake levels in Clear Lake and Gerber Reservoirs, the Biological Opinion implicitly determines critical habitat for the endangered suckers. The Biological Opinion does not take into consideration the economic impact of that determination, as required by § 4 of the ESA, 16 U.S.C. § 1533(b)(2). There is abundant commercially and scientifically available evidence as to the substantial negative economic impact of designating the critical habitat of the endangered suckers at the lake levels set by the Biological Opinion.

23. By imposing restrictions on lake levels in Clear Lake and Gerber Reservoirs, the Biological Opinion implicitly determines critical habitat for the endangered suckers. The designation of critical habitat is a major federal action to which NEPA procedural requirements apply.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
VIOLATION OF THE ENDANGERED SPECIES ACT VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

24. Plaintiffs reallege paragraphs 1 through 23 above.

25. Defendants have violated § 7 of the ESA, 16 U.S.C. § 1536, and its implementing regulations, 50 C.F.R. Part 402, by improperly concluding on page 2 of the Biological Opinion that the BOR's continued operation of

the Klamath Project, including Clear Lake and Gerber reservoirs, is likely to jeopardize the continued existence of the Lost River and shortnose suckers. Defendants' violation of the ESA is subject to judicial review under section 11(g) of the ESA, 16 U.S.C. § 1540(g)(1)(C).

26. Defendants' inclusion of Clear Lake and Gerber reservoirs in its jeopardy opinion is arbitrary, capricious, and an abuse of discretion, and violates the APA, 5 U.S.C. § 706(2)(A). Defendants' violation of the APA is subject to judicial review under 5 U.S.C. § 701 *et seq.*

SECOND CLAIM FOR RELIEF
VIOLATION OF THE ENDANGERED SPECIES ACT VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

27. Plaintiffs reallege paragraphs 1 through 23 above.

28. Defendants have violated § 7 of the ESA, 16 U.S.C. § 1536, and its implementing regulations, 50 C.F.R. Part 402, by improperly imposing restrictions on the withdrawal of irrigation water from Clear Lake and Gerber reservoirs, as specifically set forth in paragraph 19 above. Defendants' violation of the ESA is subject to judicial review under section 11(g) of the ESA, 16 U.S.C. § 1540(g)(1)(C).

29. Defendants' imposition of restrictions on the withdrawal of irrigation water from Clear Lake and Gerber reservoirs is arbitrary, capricious, and an abuse of discretion, and violates the APA, 5 U.S.C. § 706(2)(A). Defendants' violation of the APA is subject to judicial review under 5 U.S.C. § 701 *et seq.*

THIRD CLAIM FOR RELIEF
VIOLATION OF THE ENDANGERED SPECIES ACT
VIOLATION OF THE ADMINISTRATIVE
PROCEDURE ACT

30. Plaintiffs reallege paragraphs 1 through 23 above.

31. Defendants have violated § 4 of the ESA, 16 U.S.C. § 1533(b)(2), and its implementing regulations, 50 C.F.R. Part 402, by implicitly determining critical habitat for the Lost River suckers and the shortnose suckers in Clear Lake and Gerber reservoirs, as more specifically alleged in paragraph 21 above, without considering the economic impact of that determination. Defendants' violation of the ESA is subject to judicial review under section 11(g) of the ESA, 16 U.S.C. § 1540(g)(1)(C).

32. Defendants' failure to consider the economic impact of its critical habitat determination is arbitrary, capricious, and an abuse of discretion and violates the APA, 5 U.S.C. § 706(2)(A). Defendants' violation of the APA is subject to judicial review under 5 U.S.C. § 701 *et seq.*

FOURTH CLAIM FOR RELIEF
VIOLATION OF THE NATIONAL
ENVIRONMENTAL POLICY ACT OF 1969
VIOLATION OF THE ADMINISTRATIVE
PROCEDURE ACT

33. Plaintiffs reallege paragraphs 1 through 23 above.

34. Defendants have violated NEPA, 42 U.S.C. 4332(2)(c) by failing to prepare an environmental assessment prior to determining critical habitat for the Lost River sucker and the shortnose sucker in Clear Lake and Gerber reservoirs, as alleged above, and by failing to consider the economic impact of that determination. Although NEPA has no provision granting judicial review of agency decisions reached in violation of its procedural requirements, defendants' violation of NEPA is subject to judicial review under section 702 of the APA. 5 U.S.C. 702.

35. Defendants' failure to consider the economic impact of its determination of critical habitat is arbitrary, capricious, and an abuse of discretion and violates the APA, 5 U.S.C. 706(2)(A). Defendants' violation of the APA is subject to judicial review under 5 U.S.C. 701, et seq.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs request the Court to:

A. Adjudge and declare that defendants have violated the Endangered Species Act and the Administrative Procedure Act by including Clear Lake reservoir and Gerber reservoir in the jeopardy conclusion on page 2 of the Biological Opinion of July 22, 1992.

B. Adjudge and declare that defendants have violated the Endangered Species Act and the Administrative Procedure Act by improperly imposing restrictions on the withdrawal of irrigation water from Clear Lake and Gerber reservoirs in the Biological Opinion of July 22, 1992.

C. Adjudge and declare that defendants have violated the Endangered Species Act and the Administrative Procedure Act by implicitly determining critical habitat for the Lost River suckers and the shortnose suckers in Clear Lake and Gerber reservoirs in the Biological Opinion of July 22, 1992, without considering the economic impact of that determination.

D. Adjudge and declare that defendants have violated the National Environmental Policy Act and the Administrative Procedure Act by implicitly determining critical habitat for the Lost River sucker and the shortnose sucker in Clear Lake and Gerber reservoirs in the Biological Opinion of July 22, 1992, without considering the economic impact of that determination.

E. Set aside the Biological Opinion of July 22, 1992, as unlawful and void of force under the ESA, the NEPA, and the APA.

F. Award plaintiffs their reasonable fees, costs and disbursements, including attorney fees.

G. Grant plaintiffs such further and additional relief as the Court may deem just and proper, including injunctive relief pursuant to 16 U.S.C. Section 1540(g)(1)(A) to implement the foregoing.

Dated: March 8, 1993.

William F. Schroeder,
Larry A. Sullivan,
John T. Schroeder,
W. Alan Schroeder.

By /s/ W.F. Schroeder
W.F. Schroeder
Plaintiffs' lawyers.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRAD BENNETT, et al., Plaintiff-Appellants, v. MARVIN L. PLENERT, in his official capacity as Regional Director, Region One, Fish and Wildlife Service, U.S. Department of the Interior, et al., Defendant-Appellees.	No. 94-35008 D.C. No. 94-35008 **ORDER** (Filed Oct. 12, 1995)

BEFORE: Pregerson, Canby, and Reinhardt, Circuit Judges:

The time for filing a petition for rehearing with a suggestion for rehearing en banc is extended to October 27, 1995. The ex parte application for extension of page limitation is denied.
